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No. 03-526

Supreme Court, U.S.
FILED
OCT 24 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), this Court held that Arizona's enumerated aggravating circumstances operate as the functional equivalent of elements of the greater offense of capital murder and that the Sixth Amendment therefore requires they be found by a jury. The United States Court of Appeals for the Ninth Circuit applied *Ring* retroactively in Respondent Warren Summerlin's federal habeas corpus proceeding.

The question presented is whether, under this Court's retroactivity jurisprudence, *Ring* applies to the federal habeas corpus proceeding of an Arizona prisoner under a sentence of death whose direct appeal became final prior to this Court's ruling in *Ring*.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Constitutional Provisions Involved	vi
Statement of the Case	1
Reasons for Denying the Petition	4
Conclusion	10

TABLE OF CITED AUTHORITIES

FEDERAL CASES

	Page
Allen v. Hardy, 478 U.S. 255 (1986)	5
Almendarez-Torres v. United States, 523 U.S. 224 (1998)	9
Apprendi v. New Jersey, 530 U.S. 466 (2000)	8, 9
Bousley v. United States, 523 U.S. 614 (1998)	4, 8, 9
Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002)	4, 6
Case v. Nebraska, 381 U.S. 336 (1965)	6
Kyles v. Whitley, 498 U.S. 931 (1990)	6
Moore v. Kinney, 320 F.3d 767 (8th Cir. 2003)	7
Palmer v. Clarke, __ F. Supp.2d __, No. 4:00CV3020 2003 WL 22327180 (D. Neb. Oct. 9, 2003)	7
Proffitt v. Florida, 428 U.S. 242 (1976)	1
Ring v. Arizona, 536 U.S. 584 (2002)	*passim*
Sawyer v. Smith, 497 U.S. 227 (1990)	3
Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003)	3, 5, 7, 8, 9

Page

Teague v. Lane, 489 U.S. 288 (1989) 3, 5, 7, 9

Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) .. 4, 7

United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002) 8

Whitfield v. Bowersox, 324 F.3d 1009 (8th Cir. 2003) 7

STATE CASES

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) 7

Colwell v. State, 59 P.3d 463 (Nev. 2002) 4, 6

King v. Moore, 831 So. 2d 143 (Fla. 2002) 7

State v. Lotter, 266 Neb. 245, 664 N.W.2d 892 (2003) 4, 6

State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003) .. 9

State v. Slemmer, 170 Ariz. 174, 823 P.2d 41 (1991) 5

State v. Summerlin, 138 Ariz. 426, 675 P.2d 686 (1983) 2

Page

State v. Towery, 204 Ariz. 386, 64 P.3d 828 (2003) 4, 5, 6

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003) 6

UNITED STATES CONSTITUTION

Sixth Amendment 1, 2, 5

Fourteenth Amendment 1

FEDERAL STATUTES

28 U.S.C. § 2244(b) 6, 7

STATE STATUTES

Ariz. Rev. Stat. § 13-703 (1981) 1, 9

SUPREME COURT RULES

Rule 10 4

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law. . . .

STATEMENT OF THE CASE

On July 12, 1982, a judge of the Maricopa County Superior Court sentenced Respondent Warren Summerlin to death for his conviction on one count of first-degree murder. Pursuant to the Arizona capital sentencing statute in effect at the time, *see* Ariz. Rev. Stat. § 13-703 (1981), *amended by* Ariz. Rev. Stat. §§ 13-703 and 13-703.01 (2002), the judge imposed the sentence of death following a sentencing hearing in which he sat as the finder of fact on the existence of aggravating and mitigating circumstances. As aggravating circumstances, the judge found that (1) Mr. Summerlin had a prior felony conviction involving the use or threatened use of violence on another person; and (2) Mr. Summerlin committed the offense in an especially heinous, cruel, or depraved manner. The judge found no mitigating circumstances.

On his direct appeal to the Arizona Supreme Court, Mr. Summerlin argued, among other things, that Arizona's death penalty statute violated the guarantees of the Sixth and Fourteenth Amendments to the United States Constitution because it denied him the right to have a jury determine the factual questions that led to the imposition of the death penalty. Excerpt of Record before the United States Court of Appeals for the Ninth Circuit, Volume III, Exhibit 40 (excerpt from Mr. Summerlin's opening brief to the Arizona Supreme Court on direct appeal). Inaccurately describing Mr. Summerlin's argument as a challenge to the constitutionality of a system that permitted the trial judge to "determine whether to impose the death penalty," the state supreme court rejected the argument by citing to this Court's decision in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976), which reaffirmed the principle that jury *sentencing* is not

constitutionally required. *State v. Summerlin*, 138 Ariz. 426, 435, 675 P.2d 686, 695 (1983).

The Arizona Supreme Court affirmed Mr. Summerlin's convictions and sentences on November 21, 1983. Mr. Summerlin filed a timely motion for reconsideration, which the state supreme court denied on January 18, 1984. His convictions and sentences became final on April 17, 1984, when the time for seeking review by this Court elapsed.

In *Ring v. Arizona*, this Court held that Arizona's enumerated aggravating circumstances operate as the functional equivalent of elements of the greater offense of capital murder and that the Sixth Amendment therefore requires the aggravating circumstances be found by a jury. 536 U.S. 584, 609 (2002). *Ring* thus validated the argument Mr. Summerlin had presented to the Arizona Supreme Court twenty years earlier.

Mr. Summerlin's appeal from the United States district court's denial of his petition for writ of habeas corpus was pending before the United States Court of Appeals for the Ninth Circuit when this Court issued its ruling in *Ring*. Following *Ring*, the court of appeals ordered that Mr. Summerlin's appeal be heard by an *en banc* panel of the court to resolve the question of *Ring*'s retroactive application.

In its opinion, the court of appeals clarified the issue underlying the retroactivity determination:

> In short, now that the Supreme Court has decided that Timothy Ring's capital murder conviction must be vacated because the judge was constitutionally disqualified from deciding whether Ring was eligible for the death penalty,

> the question is whether others who received the same constitutionally infirm sentence, including those who previously raised the identical issue, are eligible for the same relief or whether they should remain subject to execution.

Pet. App. A-24; *Summerlin v. Stewart*, 341 F.3d 1082, 1096-97 (9th Cir. 2003) (footnote omitted).

The court held that *Ring* applies retroactively to federal habeas corpus proceedings. Specifically, it held that the rule announced in *Ring* was one of substantive criminal law, and was therefore exempt from the retroactivity analysis applied to new rules of constitutional criminal procedure pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *See* Pet. App. A-32; *Summerlin*, 341 F.3d at 1102. In the alternative, the court of appeals held that, even if the rule announced in *Ring* were subjected to a *Teague* analysis, it would nevertheless be retroactive because it falls within *Teague*'s second exception for new rules of constitutional procedure that seriously enhance the accuracy of a criminal proceeding and alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. Pet. App. A-44; *Summerlin*, 341 F.3d at 1109 (citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

Petitioner filed a timely petition for writ of certiorari with this Court.

REASONS FOR DENYING THE PETITION

Petitioner's primary argument is that review is necessary because the court of appeals' opinion in this case conflicts with decisions of (1) the Arizona Supreme Court, *see State v. Towery*, 204 Ariz. 386, 64 P.3d 828 (2003); (2) the Tenth and Eleventh Circuits, *see Cannon v. Mullin*, 297 F.3d 989 (10th Cir. 2002), *and Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003); and (3) various state appellate courts of last resort, *see, e.g., Colwell v. State*, 59 P.3d 463 (Nev. 2002), *petition for cert. filed* May 21, 2003 (No. 02-10947), *and State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). Petitioner also argues that review by this Court is necessary because the court of appeals' decision "corrupts" this Court's analysis in *Bousley v. United States*, 523 U.S. 614 (1998), and "opens the door to untold litigation." Finally, Petitioner maintains that Mr. Summerlin's case does not implicate *Ring* because one of the aggravating factors underlying his death sentence involved a prior conviction.

Respondent acknowledges that the Arizona Supreme Court's reasoning in *Towery* is contrary to the court of appeals' analysis in this case.[1] He likewise recognizes that the retroactive application of *Ring* in federal habeas corpus proceedings is an important question of federal law. Accordingly, this case satisfies the Court's minimal criteria governing review on certiorari. *See* United States Supreme Court Rule 10.

For several reasons, however, the Court need not grant certiorari. First, the decisional conflicts identified in the

1. The Nevada Supreme Court's analysis in *Colwell v. State*, 59 P.3d 463, which relies considerably on *Towery*, also differs from the court of appeals' analysis in this case.

petition for writ of certiorari are not as significant as Petitioner maintains. Second, the court of appeals' thorough opinion, unlike any previous federal or state appellate decision to consider the issue, correctly identifies the substantive nature of this Court's ruling in *Ring* and properly concludes that, as a ruling on substantive criminal law, the decision must be given retroactive effect. Third, Petitioner is factually and legally incorrect in arguing that Mr. Summerlin's death sentence does not implicate *Ring* because one of the aggravating circumstances in his case involved a prior conviction. Mr. Summerlin will address each of these points in turn.

1. The fact that the court of appeals' analysis in this case differs from that of the Arizona Supreme Court in *Towery* is neither surprising nor particularly significant. By their very nature, all federal habeas cases present the potential for conflict between federal courts and state courts of last resort. The conflict between *Summerlin* and *Towery*, however, does not concern a substantive constitutional issue. Rather, it involves only the question of whether, in the interests of comity, finality, and judicial administration, a specific class of capital defendants will be permitted to invoke the Sixth Amendment guarantee this Court recognized in *Ring*. The legal principles governing this question are, quite permissibly, different under state and federal law.[2] Applying their distinct retroactivity analyses, the high courts of Arizona, Nevada and Nebraska have determined that they

2. Arizona determines retroactivity by a state law test that parallels in most respects, but is nevertheless distinct from, the federal *Teague* rule. *See State v. Slemmer*, 170 Ariz. 174, 179-82, 823 P.2d 41, 46-49 (1991) (adopting a retroactivity analysis combining elements from both *Teague* and *Allen v. Hardy*, 478 U.S. 255 (1986)).

will not apply *Ring* retroactively in state post-conviction proceedings. *See Towery*, 204 Ariz. 386, 64 P.3d 828; *Colwell*, 59 P.3d 463; *and Lotter*, 266 Neb. 245, 664 N.W.2d 892. The Missouri Supreme Court, however, has concluded that *Ring* must be applied retroactively. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003). Similarly, the court of appeals in this case concluded that, as a ruling on substantive criminal law, *Ring* necessarily applies retroactively. Such disagreements regarding the remedies available in state versus federal post-conviction proceedings are ones this Court need not – indeed, possibly may not – resolve. *Cf. Case v. Nebraska*, 381 U.S. 336 (1965) (discussing states' obligations to provide post-conviction relief for claims of federal constitutional violations). *See also Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of application for stay of execution) ("Because the scope of the state's obligations to provide collateral review is shrouded in so much uncertainty, . . . this Court rarely grants review at this stage of litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims.").

2. Petitioner also argues that review by this Court is necessary because other federal circuit courts and state courts of last resort have declined to apply *Ring* retroactively. However, critical factual and procedural distinctions exist between this case and the federal and state decisions Petitioner cites.

For example, although the Tenth Circuit refused to apply *Ring* retroactively in *Cannon v. Mullin*, that case involved a *successive* habeas petition governed by the strict standards of 28 U.S.C. § 2244(b). 297 F.3d at 992. Simply put, the Tenth Circuit was precluded from applying *Ring* retroactively

in that case because this Court had not yet ruled on the retroactivity issue, as is required by the Antiterrorism and Effective Death Penalty Act's narrow exception to its ban on successive petitions. *See* 28 U.S.C. § 2244(b)(2)(A). *Cannon* thus is not in conflict with *Summerlin*.

Similarly, the Eleventh Circuit's decision in *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), does not conflict with *Summerlin*. Although *Turner* discusses the potential retroactivity of *Ring* under *Teague*, that discussion is dictum. In fact, the court in *Turner* declined to consider whether *Ring* applied to Florida's capital sentencing procedure. *See id.* at 1280 and n.26. Accordingly, its comments about *Ring*'s retroactivity do not "conflict" with the Ninth Circuit's express ruling in *Summerlin*.

Other cases cited by Petitioner as "conflicts" (1) have been vacated, *see Whitfield v. Bowersox*, 324 F.3d 1009 (8th Cir. 2003), *vacated in part*, 343 F.3d 950 (8th Cir. 2003); (2) have held that *Ring* does not apply to the state statutes in question, thereby mooting any question of retroactive application, *see Bottoson v. Moore*, 833 So. 2d 693, 695 (Fla.), *cert. denied*, 537 U.S. 1070 (2002), *and King v. Moore*, 831 So. 2d 143, 144-45 (Fla.), *cert. denied*, 537 U.S. 1067 (2002); or (3) do not even involve the *Ring* issue, *Moore v. Kinney*, 320 F.3d 767, 771-72 (8th Cir. 2003) (*en banc*), *cert. denied*, 123 S. Ct. 2580 (2003) (sole issues certified for appeal concerned the constitutionality of Nebraska's "exceptional depravity" aggravating circumstance).

In contrast, the one federal decision directly to rule on *Ring*'s retroactivity in the habeas corpus context reaches the same conclusion, for much the same reasons, as the court of appeals in this case. *See Palmer v. Clarke*, __ F. Supp.2d __, No. 4:00CV3020, 2003 WL 22327180 (D. Neb. Oct. 9, 2003).

3. In attempting to portray *Summerlin* as a far-reaching decision that improperly expands this Court's ruling in *Bousley* and threatens to engender "untold litigation," Petitioner muddles the narrow ruling in the case. *Summerlin* holds only that *Ring* must be applied retroactively to Arizona death row prisoners who were sentenced under the statute this Court declared unconstitutional in *Ring*. In so holding, the court of appeals expressly rejected Petitioner's claim that applying *Ring* retroactively in this instance would undermine, or implicate in any way, its prior ruling in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002), that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would not apply retroactively in federal habeas corpus proceedings. *See* Pet. App. A-63; *Summerlin*, 341 F.3d at 1121. The court of appeals emphasized that *Ring* caused the very statute at issue in this case to be declared unconstitutional. It also recognized that the trial-like nature of the penalty phase of a capital murder proceeding and "the Eighth Amendment constraints applicable to capital trials" distinguished this case from those addressing the retroactive application of *Apprendi*.

Moreover, far from "corrupting" this Court's analysis in *Bousley*, *Summerlin* simply applied that analysis in the context of the state capital murder statute at issue in *Ring*. In *Ring*, this Court held that, because aggravating circumstances are elements of the offense of capital murder in Arizona, a jury must determine beyond a reasonable doubt whether those circumstances exist. The procedural aspect of the Court's ruling in *Ring* – that a jury must determine the existence of aggravating circumstances beyond a reasonable doubt – is merely a consequence of the *substantive* holding in *Ring* – that aggravating circumstances are elements of the offense of capital murder in Arizona. Under *Bousley*, any

new decision that identifies the statutorily defined behavior that constitutes a crime, such as the crime of capital murder, falls outside the non-retroactivity rule of *Teague*. *Summerlin* simply acknowledges the substantive nature of the ruling in *Ring*, and then properly applies *Bousley* to determine *Ring*'s retroactive application.

4. Finally, Petitioner is simply incorrect in asserting that *Ring* does not apply to Mr. Summerlin's case because one of the two aggravating factors underlying his death sentence involved a prior conviction. At the July 1982 sentencing hearing, the trial judge found that Mr. Summerlin had previously been convicted of a felony "involving the threat or use of violence on another person." *See* Ariz. Rev. Stat. § 13-703(F)(2) (1981) (amended 1993). The Arizona Supreme Court has acknowledged that this aggravating circumstance requires a finding beyond the bare fact that a prior conviction existed. *State v. Ring*, 204 Ariz. 534, 558, 65 P.3d 915, 939 (2003). Specifically, it requires a finding that the crime involved the use or threat of violence, and "the Sixth Amendment demands that a jury perform this task." *Id.*[3]

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3. In any event, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), could affect Mr. Summerlin's Sixth Amendment claim only to the extent that it is a recognized exception to the constitutional rule of *Ring*. In this regard, Mr. Summerlin submits that the reasoning of *Almendarez-Torres* has been rejected by a majority of this Court. *See id.* at 248-71 (Scalia, Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

CONCLUSION

For these reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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